

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOGA SINGH JOHAL,
Defendant.

No. CR-02-214-FVS

ORDER DENYING MOTION TO
VACATE

THIS MATTER comes before the Court without oral argument based upon request for an evidentiary hearing and motion to vacate the judgment. He is represented by Mark E. Vovos; the government by Joseph H. Harrington.

PROCEDURAL HISTORY

Joga Johal and Balraj Singh were charged in separate indictments with possessing and/or distributing pseudoephedrine knowing, or having reasonable cause to believe, that someone was going to use it to manufacture a controlled substance. 21 U.S.C. § 841(c)(2). Although the crimes allegedly occurred at different places and, with one exception, on different dates, the two men were tried together. The jury began deliberating on Friday, April 25, 2003. It sent a series of notes to the Court that day. One stated in part:

Can we look at language problems as well as cultural values shown in testimony? Do we judge from our lives?

(Ct. Rec. 133.) The jury did not reach a verdict on Friday.

1 Deliberations resumed on Monday, April 28th. At some point that day,
2 a single juror sent the following note to the Court:

3 On Friday we voted [word scratched out] of the
4 defendants guilty but I refused to sign the paperwork
because I wanted more time.

5 Currently, we are at an hopeless impasse [sic] on [word
6 scratched out] both cases.

7 (Ct. Rec. 139.) Ultimately, the Court declared a mistrial. The
8 government dismissed the charges against Mr. Singh, but proceeded with
9 the charges against Mr. Johal. The second trial began on July 30,
10 2003. The case went to the jury on August 6th. Later that day, the
11 jury informed the Court in writing that it had reached a verdict.
12 This was the only note which the jury sent to the Court. The jury
13 found Mr. Johal guilty as charged. On December 12th, the Court
14 sentenced Mr. Johal to a term of 70 months incarceration. He filed a
15 notice of appeal and the Court allowed him to remain out of custody
16 while his appeal was pending. On August 30, 2005, the Ninth Circuit
17 filed a published opinion affirming the judgment. *United States v.*
18 *Johal*, 428 F.3d 823 (9th Cir.2005). Mr. Johal began serving his
19 sentence on June 15, 2006. On May 15, 2007, he filed a motion to
20 vacate the judgment on the ground that he was denied constitutionally
21 effective assistance of counsel in violation of the Sixth Amendment.
22 28 U.S.C. § 2255. See *Strickland v. Washington*, 466 U.S. 668, 687,
104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

23 **GROUND S FOR RELIEF**

24 Mr. Johal owned and operated a convenience store. At trial, he
25 acknowledged that he knew he was selling substantially more
26 pseudoephedrine than the law permitted him to sell and that it was
wrong to do so. (Transcript of Second Trial (Ct. Rec. 241), at 882-

1 3.) Nevertheless, his attorney argued that Mr. Johal neither knew
2 nor reasonably should have known that someone was going to use the
3 pseudoephedrine to manufacture a controlled substance. In support of
4 this defense, the attorney presented both lay and expert testimony
5 concerning Mr. Johal's limited comprehension of the English language.
6 Looking back on his trial, Mr. Johal argues that his attorney's
7 performance was deficient. Not only did he overlook important lay
8 witnesses, but also he allegedly failed to obtain adequate testing and
9 analysis of Mr. Johal's English-comprehension skills. Mr. Johal
10 alleges that he suffered prejudice as a result. According to Mr.
11 Johal, his attorney's failure to marshal more testimony, especially
12 more compelling expert testimony, undermined his contention that he
13 lacked the English-comprehension skills necessary to form the *mens rea*
14 of the crime charged. Mr. Johal urges the Court to hold an
15 evidentiary hearing. At the hearing, says Mr. Johal, he will document
16 the limitations upon his ability to understand English and demonstrate
17 why he suffered prejudice from his attorney's inadequate performance.

18 **STANDARD**

19 In order to prevail, Mr. Johal must prove that his trial
20 attorney's performance was unreasonable under prevailing professional
21 standards, and that there is a reasonable probability the verdict
22 would have been different but for his attorney's unprofessional
23 errors. See *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir.2001). "A
24 reasonable probability is 'a probability sufficient to undermine
25 confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at
26 694, 104 S.Ct. at 2068). Mr. Johal is entitled to an evidentiary
hearing unless the motion, files, and records of the case
"conclusively show" that he is entitled to no relief. 28 U.S.C. §

1 2255(b). See *United States v. Howard*, 381 F.3d 873, 877 (9th
2 Cir.2004) (a district court may deny a request for an evidentiary
3 hearing only if the claim is "'so palpably incredible or patently
4 frivolous as to warrant summary dismissal'" (quoting *United States v.*
5 *Leonti*, 326 F.3d 1111, 1116 (9th Cir.2003))).

6 **RULING**

7 Mr. Johal's trial attorney offered testimony that Mr. Johal did
8 not understand English very well during March of 2002. The jury
9 considered this testimony along with the rest of the evidence. The
10 jury found Mr. Johal guilty. Implicit in the jury's verdict was a
11 determination that his English was good enough to form the *mens rea*
12 necessary to violate 21 U.S.C. § 841(c)(2); that is to say, he knew or
13 reasonably should have known that the pseudoephedrine which he sold
14 was going to be used to manufacture a controlled substance. After the
15 Ninth Circuit affirmed the judgment, Mr. Johal began obtaining
16 additional assessments of his English-comprehension skills. A number
17 of experts are prepared to testify on his behalf.¹ However, only one
18 of them, Kathleen R. Fahey, Ph.D., has personally interacted with Mr.
19 Johal. (See, e.g., Declaration of Mark E. Vovos in Support of Request
20 for an Evidentiary Hearing (**Ct. Rec. 306**), at 2-3.) Unlike Mr.
21 Johal's experts (with the exception of Dr. Fahey), the jurors had an
22 opportunity to listen to him, both on tape and in person. The

23 ¹The Court assumes, for purposes of argument, that the
24 testimony is admissible under Federal Rule of Evidence 704. Cf.
25 *United States v. Morales*, 108 F.3d 1031, 1041 (9th Cir.1997) (en
26 banc) ("[a] prohibited 'opinion or inference' under Rule 704(b)
is testimony from which it necessarily follows, if the testimony
is credited, that the defendant did or did not possess the
requisite *mens rea*").

1 following is some of the evidence that they considered:

2 On March 7, 2002, law enforcement officers had Pascale Hostetler
3 don a transmitter and enter Mr. Johal's convenience store. She asked
4 for a comparatively large quantity of pseudoephedrine:

5 Hostetler: Can I get . . . twenty boxes?

6 Johal: You can get three.

7 Hostetler: As many . . . That's it?

8 Johal: The law, no, the ah, I, I show
9 you letter.²

10 Hostetler: Okay, okay.

11 Johal: The (unintelligible) three,
12 (unintelligible) no more than
13 just the three.

14 Hostetler: Really? They're cracking
15 down, that's why.

16 Johal: (Laughing). They're
17 (unintelligible).

18 Hostetler: Yes, yeah.

19 Johal: I don't know why

20 ²Mr. Johal was questioned about the letter at trial:

21 Q. Do you remember listening to the tape of
22 March 7th, 2002 where you referred to a
23 letter?

24 A. Letter? That was just lighter when we light
25 a cigarette.

26

Q. And is it your testimony that you said
lighter?

A. I don't know. I can't recall.

(Transcript of Second Trial (**Ct. Rec. 241**), at 903.)

1 (unintelligible) the law is
2 three.

3 (Transcript of Recording made on March 7, 2002 (**Ct. Rec. 302-3**), at 8-
4 9.) Despite acknowledging a three-box limit, Mr. Johal did not abide
5 by it. He made a number of sales to Ms. Hostetler and the undercover
6 officer during the course of the evening. All together, he sold them
7 61 boxes of "Action" brand pseudoephedrine. (Transcript of Second
8 Trial (**Ct. Rec. 236**), at 342, 346.)

9 Ms. Hostetler and the undercover officer were not Mr. Johal's
10 only customers that night. Another was Daniel Wooton. Acting on his
11 own to obtain ingredients for "cooking" methamphetamine, he went to
12 Mr. Johal's convenience store and purchased a case of matches for \$65.
13 (Transcript of Second Trial (**Ct. Rec. 240**), at 725-28.) Afterward, he
14 was stopped by law enforcement officers. He decided to cooperate.
15 (*Id.* at 729-30.) On March 13, 2002, officers placed a transmitter on
16 him and had him enter Mr. Johal's convenience store. (*Id.* at 731-32.)
He did not ask for pseudoephedrine by name:

17 Wooton: Hey . . . you got pills?

18 Johal: What?

19 Wooton: Pills? A case?

20 Johal: Action?

21 Wooton: You got a case?

22 Johal: Action.

23 Wooton: Huh?

24 Johal: Action.

25 Wooton: Ex . . . what?

26 Johal: Action. Action.

Wooton: Action, er . . . whatever . . .

1 Johal: Um, huh.
2 Wooton: How much?
3 Johal: Fifteen hundred.
4 Wooton: Fifteen?
5 Johal: Um, huh.
6 Wooton: Alright.
7 Johal: (Unintelligible).
8 Wooton: Do I just hang out or what? What?
9 Johal: You want . . . ah, box matches?
10 Wooton: Huh?
11 Johal: You want matches?
12 Wooton: No . . . just the pills tonight.
13 Johal: You matches today?
14 Wooton: Yeah.
15 Johal: No problem. (Unintelligible).
16 Wooton: Yeah, I was getting the cases.
17 Johal: (Unintelligible). Matches?
18 Wooton: Yeah . . . I don't need any of them
19 tonight.
20 Johal: Huh?
21 Wooton: I don't need them tonight.
22 Johal: You want now?
23 Wooton: No, I don't need them.
24 Johal: You bought here before.
25 Wooton: Yeah.
26 Johal: I, I, I, I, I, order for you.
 Wooton: Sixty five bucks.
 Johal: Yeah, and I order for you.

1 Wooton: Oh, you did?

2 Johal: Yeah.

3 Wooton: Alright . . . good . . . well that is a
4 last resort there . . . but . . .
5 (Shuffling)

6 Johal: I give you a discount for you.

7 (Transcript of Recording made on March 13, 2002 (**Ct. Rec. 302-4**), at
8 4-6.) Mr. Wooton paid \$1500 to Mr. Johal. (Transcript of Second
9 Trial (**Ct. Rec. 240**), at 732-§33.) After a while, Mr. Johal summoned
10 Mr. Wooton to a storeroom. An associate of Mr. Johal's gave Mr.
11 Wooton a case of Action-brand pseudoephedrine. (*Id.* at 733.) It was
12 concealed in a box. As Mr. Wooton walked toward the exit, Mr. Johal
13 and/or his associate placed ice on top of the box. (*Id.* at 733-34.)

14 Evidence concerning the controlled buys enabled the jury to
15 observe how Mr. Johal responded to customers who asked to purchase
16 large quantities of pseudoephedrine. The jury also had an opportunity
17 to observe him testify during his second trial. His attorney asked
18 questions in English, which were interpreted to him in Punjabi. On at
19 least ten occasions, he answered in English. The following questions
20 and answers are representative:

21 Q. And did your wife work there as well?

22 A. Yes. (In English) Stocking. (Through the
23 interpreter) She was stacking (sic).

24 Q. And 1998, did you stop working there? And if so,
25 where did you work next?

26 A. Because I got my half share from Grocery Boys when
it came out of business. (In English) then I buy
store 2501 West Boone. (Through the interpreter)

1 Then I bought a store at 2501 Boone Street. That
2 was on Boone Street. I work small store over
3 there.

4

5 Q. Did you buy that yourself? Or did you have a
6 partner in that store?

7 A. (In English) I have it by myself. I have my
8 friend, and he help me. (Through the interpreter)
9 Because there was a friend. He helped me, but I
10 owned fully.

(Transcript of Second Trial (**Ct. Rec. 240**), at 859.)

11 Mr. Johal's attorney did not complete his direct examination that
12 afternoon. Mr. Johal returned to the witness stand the next morning.
13 He did not answer any questions in English.

14 During cross-examination, an Assistant United States Attorney
15 ("AUSA") asked a number of questions concerning Mr. Johal's English-
16 comprehension skills, including the following:

17 Q. In fact, it's a fact that you understand the
18 English language and you understand it better than
19 you speak it; isn't that right?

20 A. No. Because sometimes there's an item in front of
21 me, I can understand what is that. Or someone
22 speaks slowly, I can understand.

23 (Transcript of Second Trial (**Ct. Rec. 241**), at 889.)

24 Q. So its fair to say that you have learned English;
25 isn't that right?

26 A. Just little bit.

. . . .

1 A. I understand if you speak slow. [Balance of
2 answer omitted.]

3 (*Id.* at 894.)

4 During redirect, Mr. Johal's attorney sought to establish that
5 the AUSA had used words that Mr. Johal did not understand:

6 Q. . . . There's some words that you were asked.

7 One word is "proficiency."³

8 A. What?

9 Q. Do you know that the word "proficiency" was?

10 A. No.

11 Q. So when the Government was asking you about your
12 reading proficiency, do you know what that means?

13 A. No.

14

15 Q. Why did you answer the questions if you did not
16 understand the words?

17 A. Which questions?

18 Q. When you were asked about reading proficiency.

19 A. Because I just thought that they are asking me if
20 I can read a little bit.

21 (*Id.* at 922-23.) The preceding testimony illustrates Mr. Johal's
22 ability to communicate effectively in English. Although he did not
23 know the formal definition of the word "proficiency," he clearly
24 understood that he was being questioned about his ability to read.

25 ³"And tell the members of the jury whether you passed that
26 reading proficiency exam?" (Transcript of Second Trial (**Ct. Rec.**
241), at 916.)

1 Mr. Johal does not deny that, at all times relevant to this
2 action, he understood some English. The issue is whether the jury was
3 presented with enough evidence to fairly evaluate his English-
4 comprehension skills. Contrary to Mr. Johal, there is no reason to
5 think that additional testimony, whether lay or expert, would have
6 altered the outcome. He knew that he was not supposed to sell more
7 than three boxes of pseudoephedrine at a time. Nevertheless, on March
8 7th and March 13th of 2002, he sold scores of boxes at sharply
9 inflated prices, all the while attempting to conceal the sales. Ms.
10 Hostetler used the words "crystal" and "cooks" to signal the reason
11 she wanted to purchase the pseudoephedrine. At trial, Mr. Johal
12 denied knowing the "street" meanings of words such as these. However,
13 when Mr. Wooton asked for a case of "pills," Mr. Johal clearly
14 understood he meant Action brand pseudoephedrine. Not only did Mr.
15 Johal agree to sell him a case for \$1500, but also he volunteered to
16 sell Mr. Wooton a case of matches at a discount. The offer is
17 interesting. Mr. Johal knew that his customers normally took
18 pseudoephedrine for "the sniffles." (*Id.* at 905.) Rarely does a
19 person seeking relief from cold symptoms also seek a case of matches.
20 The fact that Mr. Johal associated a case-size sale of matches with a
21 case-size sale of pseudoephedrine clearly implies that he knew the
22 pseudoephedrine was going to be used to manufacture a controlled
23 substance.

24 In sum, the record shows conclusively that Mr. Johal suffered no
25 prejudice from his trial attorney's alleged errors. Consequently, Mr.
26 Johal was not deprived of his Sixth Amendment right to
constitutionally effective assistance of counsel. Both his request
for an evidentiary hearing and his motion to vacate the judgment are

1 denied.

2 **IT IS HEREBY ORDERED:**

3 1. The defendant's motion for oral argument (**Ct. Rec. 307**) is
4 denied.

5 2. The defendant's motion for an ex parte in camera hearing (**Ct.**
6 **Rec. 303**) is denied.

7 3. The defendant's motion to vacate (**Ct. Rec. 294**) is denied.

8 **IT IS SO ORDERED.** The District Court Executive is hereby
9 directed to enter this order and furnish copies to counsel.

10 **DATED** this 26th day of March, 2008.

11 s/ Fred Van Sickle
12 Fred Van Sickle
13 United States District Judge
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